

**#2560**

**signed 8-29-01**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In Re:**

**STEVEN JEWELL BRUCE,**

**DEBTOR.**

**CASE NO. 99-42345-7  
CHAPTER 7**

**JERRY BECKER,**

**PLAINTIFF,**

**v.**

**ADV. NO. 00-7101**

**STEVEN JEWELL BRUCE,**

**DEFENDANT.**

**ORDER GRANTING DEFENDANT-DEBTOR'S MOTION  
FOR SUMMARY JUDGMENT**

This proceeding is before the Court on the defendant-debtor's motion for summary judgment. The debtor appears by counsel Matthew M. Merrill. The plaintiff appears by counsel Jonathan C. Becker. The Court has reviewed the relevant pleadings and is now ready to rule.

**FACTS**

The following facts are not controverted. The outcome of the debtor's motion for summary judgment turns on the question whether plaintiff Jerry Becker had knowledge of the debtor's alleged fraud before the debtor received a discharge of his debts pursuant to 11 U.S.C.A. §727(a). The

alleged fraud is that the debtor transferred an untitled race car less than ninety days before he filed for bankruptcy, but did not disclose the transfer on the Statement of Financial Affairs that he filed in connection with filing for bankruptcy and falsely testified at the meeting of creditors held pursuant to §341(a) that the transfer had occurred more than a year before he filed for bankruptcy on October 15, 1999.

At the meeting of creditors held on November 9, 1999, which Mr. Becker's attorney attended, the debtor testified as follows in response to questions from another creditor's attorney:

Q: You had a 1960 Camaro body on a racecar fairly recently, do you recall the car I'm talking about?

A: I had one a couple of years ago and I did drive it this summer.

Q: Then you had it as recently as August, didn't you?

A: It was at my shop, yes.

Q: What happened to that car?

A: It's at J.R. Sandlian's house which owns the car.

. . . .

Q: Where's that

A: Wichita, Kansas.

Q: And why is it there?

A: Because he had loaned me money and basically he got the car for the money he loaned me.

Q: Did you list that on the schedule that you just filed?

A: This was two years ago.

Q: I thought you had it this August?

A: It wasn't mine, I was driving it.

Q: Under an agreement with him?

A: Yes.

Q: Were you trying to sell the car in September?

A: Yes. I asked him, he knew I was in trouble with my business and that if I could sell the car and pay him what I owed him, anything over that I could keep.

Q: Did you have a written agreement to that effect?

A: I had a personal agreement with him.

Q: Was it written?

A: No.

Q: When was that agreement made?

A: Well, basically in September.

Q: Of this year?

A: Yeah, he's had the car before that.

Q: When was the debt incurred that you had with him?

A: It would have been in September 1997.

Q: And when did you give him the car?

A: Well, he's had the car several times down at his house.

Q: Has he always owned it, or did you own it for a while?

A: Well, I started building it, then I needed money to finish another car, so the bank wouldn't loan me money to get the job done, and he loaned me money and basically took the car as collateral.

Q: When did you finish the car?

A: Late 1997.

Q: And is that when you gave it to him?

A: Yes.

Q: What documents do you have to show that you transferred that to him?

A: Didn't need a document, I didn't think.

Mr. Becker did not file a proceeding pursuant to §727(a) objecting to the debtor's discharge, and the

discharge was entered on February 24, 2000.

Almost six months later, on August 2, Mr. Becker's attorney deposed the debtor in connection with another adversary proceeding Mr. Becker had filed against him. In response to the debtor's motion for summary judgment, Mr. Becker relies on the following questions asked by his attorney and the debtor's responses:

Q: At your first meeting of creditors, some questions were asked to you about a Camaro and about its location. Do you know who owns that Camaro?

A: Yes. J.R. Sandlain [sic].

Q: When did he receive that Camaro?

A: When did he take possession of it?

Q: Yes.

A: He took it from me on -- I don't remember what the date was. It was sometime in August.

Q: Of 1999?

A: Yes.

About six weeks later, Mr. Becker filed this adversary proceeding, seeking to revoke the debtor's discharge pursuant to §727(d)(1). When asked to identify all documents that supported his allegations that the debtor misrepresented the Camaro transfer and hid assets, Mr. Becker listed four items that existed before the debtor was granted a discharge and the August 2, 2000, deposition testimony quoted above.

## DISCUSSION

Section 727(d) provides in pertinent part:

On request of . . . a creditor, . . . the court shall revoke a discharge granted under subsection (a) of this section if—

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge.

In response to the debtor's motion for summary judgment, Mr. Becker explains that the debtor disclosed the transfer of the race car at the meeting of creditors, but said nothing that would support a cause of action to avoid the transfer under §547 of the Bankruptcy Code as a preference or to avoid the transfer under state law as fraudulent. Then, Mr. Becker says, "[D]uring his deposition, the Debtor was again asked about the transfer of the car and his testimony differed markedly from his testimony at the [creditors] meeting. . . . This factual dispute precludes summary judgment."

The Court cannot agree with Mr. Becker's argument. A review of the debtor's testimony at the creditors meeting indicates he said that he had transferred the car more than one year before he filed for bankruptcy, but that he had possession of and was driving it in August 1999, about two months before he filed for bankruptcy, and that he gave it back to Mr. Sandlian around that time. In the deposition, he said he gave possession to Mr. Sandlian in August 1999. This was simply not new information. Therefore, Mr. Becker cannot satisfy the requirement of §727(d)(1) that he must not have had knowledge of the alleged fraud before the debtor received a discharge. *See Bowman v. Belt Valley Bank (In re Bowman)*, 173 B.R. 922, 925 (9th Cir B.A.P. 1994); *Continental Builders v. McElmurry (In re McElmurry)*, 23 B.R. 533, 535 (W.D. Mo. 1982).

In addition, since the debtor clearly stated at the creditors meeting that he had the car less than ninety days before he filed for bankruptcy and had an agreement with Mr. Sandlian that he could retain any excess proceeds if he could sell the car for more than he owed Mr. Sandlian, Mr. Becker had

notice that the debtor might have had some kind of unreported ownership interest in the car at that time that he transferred to Mr. Sandlian in August 1999 or later. If a creditor has knowledge of a possible fraud, he must diligently investigate it before discharge, or risk losing any claim under §727(d)(1) by waiting until after discharge. *Bowman*, 173 B.R. at 925; *McElmurry*, 23 B.R. at 535-37; 6 *Collier on Bankruptcy* ¶727.15[3] (Lawrence P. King, *et al.*, eds., 15th ed. 2001). Here, to investigate diligently, Mr. Becker should at least have taken the debtor's deposition sometime between the creditors meeting and the February 2000 discharge, instead of waiting until August 2000 to do so. If the deposition could not have been scheduled in time, Mr. Becker should have sought an extension of time under Fed. R. Bankr. P. 4004(b) to file a complaint under §727(a) objecting to the debtor's discharge.

For these reasons, the Court concludes that, even viewing matters in the light most favorable to Mr. Becker, the alleged fraud that he is relying on was known to him before the debtor received his discharge. Even if the alleged fraud was not actually revealed to Mr. Becker, sufficient facts were disclosed in the debtor's testimony at the creditors meeting that a diligent investigation would have revealed the fraud before the discharge. The debtor's motion for summary judgment is therefore granted.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this \_\_\_\_ day of August, 2001.

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JAMES A. PUSATERI  
CHIEF BANKRUPTCY JUDGE